

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RALPH KAZMIRSKI,

Petitioner,

v.

9:04-CV-0089
(TJM)(DRH)

THOMAS POOLE, Superintendent, Five Points
Correctional Facility,

Respondent.

APPEARANCES:

OF COUNSEL:

RALPH KAZMIRSKI
Petitioner, *pro se*

OFFICE OF THE ATTORNEY GENERAL
STATE OF NEW YORK
Counsel for the Respondent

MARIA MORAN, ESQ.
Assistant Attorney General

THOMAS J. McAVOY, SENIOR JUDGE

ORDER

By Decision and Order filed December 1, 2005, the Report-Recommendation by Magistrate Judge David R. Homer was approved and adopted in its entirety and the petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 filed by petitioner Ralph Kazmirski was denied. Dkt. No. 20. Petitioner appealed that dismissal to the United States Court of Appeals for the Second Circuit. Dkt. No. 22.¹

Presently before the Court is petitioner's request for a certificate of appealability ("COA"). Dkt. No. 26.

Appeals to the Court of Appeals in habeas corpus proceedings are governed by

¹ By Order filed April 18, 2006, the Second Circuit dismissed the appeal without prejudice to the appeal being reinstated upon notice to the Clerk within thirty days from the entry of an order by this court granting or denying a certificate of appealability. Dkt. No. 25.

28 U.S.C. § 2253, which provides in relevant part that:

- (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 - (B) the final order in a proceeding under section 2255.²

A COA may only be issued “if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

After reviewing the file, and for the reasons set forth in the Court’s Decision and Order and in the Report-Recommendation filed in this matter, the Court finds that petitioner has failed to make the showing required for issuance of a COA. Therefore, the Court denies his request.

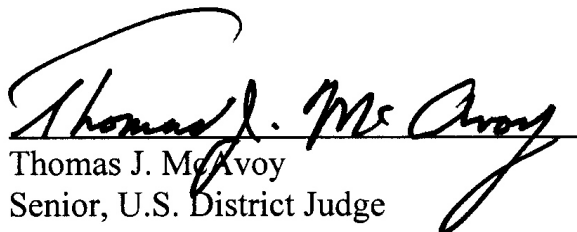
WHEREFORE, it is hereby

ORDERED, that petitioner's application for a Certificate of Appealability (Dkt. No. 26) is denied, and it is further

ORDERED, that the Clerk serve a copy of this Order on the parties.

IT IS SO ORDERED.

Dated: May1,2006


Thomas J. McAvoy
Senior, U.S. District Judge

² Rule 22 of the Federal Rules of Appellate Procedure also provides that an appeal may not proceed “unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).” Fed.R.App.P. 22(b).